Riverside Cement Company, a Gifford-Hill Cement Company *and* Independent Workers of North America, Local Union 192. Cases 31–CA–17659 and 31–CA–17924

December 10, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 28, 1991, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Riverside Cement Company, a Gifford-Hill Cement Company, Oro Grande, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Union, we rely on the fact that such withdrawal did not occur in a context free of substantial unfair labor practices. More particularly, the withdrawal occurred at a time when Respondent was refusing to meet and bargain with the Union. We, therefore, find it unnecessary to pass on whether the Respondent otherwise had a good-faith doubt of the Union's majority status.

Alice Joyce Garfield, Esq., for the General Counsel.
Roger G. Mebus, Esq. (Haynes & Boone), of Dallas, Texas, for the Respondent, with *Dean J. Schaner, Esq.*, of the same firm on the brief.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Independent Workers of North America (IWNA), Local Union 192 (the Union or Local 192), filed an unfair labor practice charge against Riverside Cement Company, A Gifford-Hill Cement Company (the Company or Respondent) in Case 31–CA–17659 on April 28, 1989.[1] The Union filed Case 31–CA–17924 against Respondent on October 16, 1989.

[1] All dates refer to the 1989 calendar year unless otherwise indicated.

On December 1, 1989, the Regional Director for Region 31 of the National Labor Relations Board (NLRB or the Board) consolidated the two cases and issued an amended consolidated complaint (complaint). The complaint incorporated a notice of hearing before an administrative law judge.

Respondent is alleged to have violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Section 8(a)(5) provides that an employer's refusal to bargain in good faith with a union selected to represent its employees is an unfair labor practice; Section 8(a)(1)—alleged here derivatively—provides that employer interference, restraint, or coercion of employees exercising their rights under the Act is an unfair labor practice.

The complaint charges that Respondent unlawfully: (1) failed to timely provide employee cost information requested by the Union; (2) refused to meet and bargain with the Union after April 3 absent the presence of a Federal Mediation and Conciliation Service (FMCS) mediator; (3) refused to meet and negotiate concerning two employee grievances; and (4) withdrew union recognition on June 13.

Respondent timely answered the complaint denying that it engaged in the unfair labor practices alleged. Although Respondent admitted that it withdrew recognition as alleged, it affirmatively asserted that it did so based on objective considerations which demonstrated that the Union no longer enjoyed majority support.

I heard this matter on April 3, 1990, at Los Angeles, California. After carefully considering the record, the demeanor of the witnesses, and the timely posthearing briefs,[2] I conclude that General Counsel has sustained all complaint allegations with exception of the claim concerning bargaining information. This conclusion is based on the following

FINDINGS OF FACT

Alleged Unfair Labor Practices

A. *The Evidence*

1. Background

Respondent, a Delaware corporation, manufactures portland cement at its Oro Grande, California plant, the only facility involved here.[3]

Respondent's production and maintenance employees selected the Union as their representative in an NLRB election on October 22, 1987; the official certification of representative issued on November 17, 1987. The Union succeeded the International Brotherhood of Boilermakers (IBB) as the employees' agent; the United Cement Lime, Gypsum and Allied Workers (UCLGA) preceded the IBB in that role.

[2] The Union filed an untimely posthearing brief opposed by Respondent. The Union seeks to excuse the late filing on the ground that it lacked access to a particular document—an employee petition discussed below—until the petition was introduced as an exhibit at the hearing. I find the Union's claim is insufficient to explain the late filing and, hence, the Union's brief has not been considered.

[3] The dollar volume of Respondent's annual direct outflow exceeds the Board's nonretail standard established for exercising its statutory jurisdiction. Accordingly, I find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction to resolve this dispute.

Negotiations commenced between Respondent's representatives and a Local 192 employee committee in February 1988. Dale Edwards, the Company's regional personnel manager since 1986, served as the Company's chief spokesman.[4] Steve Cox, the Local 192 president and a full-time company employee, spoke for the Union.

By December 1988, the parties had held 19 bargaining sessions. In June 1988, Respondent rejected a package proposal presented by the Union and submitted a noneconomic package of its own. For the next 6 months' negotiations focused on Respondent's proposals. Tentative agreements were reached on a variety of subjects but several important subjects remained unresolved, including wages, a grievance-arbitration provision and the term of the agreement.

In early December 1988, employee Carl Wray filed a petition with the NLRB seeking a decertification (RD) election.[5] It is fair to assume that this event was foremost among the problems of the Local 192 committee which caused it to request assistance from its parent organization.

Shortly thereafter, Jack Hammond Jr., an IWNA service representative in the area, began assisting the Local 192 committee and, in effect, assumed control of the negotiations on behalf of the Union. Before his employment as an IWNA agent, Hammond had been employed by both the IBB and the UCLGA in the area. While employed by these predecessor unions, Hammond negotiated and serviced agreements involving the Company and its employees at Oro Grande.

2. The 1989 contract negotiations

After reviewing the progress of negotiations with the Local 192 committee, Hammond was convinced that the union negotiators had made too many concessions and that negotiations were practically at a standstill. For these reasons, Hammond asked area FMCS Commissioner Bert Walter to schedule a bargaining session and mediate at the negotiations. For some reason not entirely clear nor important to the outcome of these cases, Walter was unable to schedule a joint bargaining session until January 27.[6]

The January 27 meeting was consumed primarily with reviewing the ground rules previously followed, the particular proposals tentatively agreed upon, and the open questions. Commissioner Walter requested that each side prepare proposals on the remaining issues for submission to each other at the next sessions which he planned to schedule.

According to Edwards, Commissioner Walter was made aware that the RD petition was pending during a conversation at the January 27 meeting. Edwards could not recall that the matter came up during the bargaining session so it is unclear whether Hammond was present when the subject arose.

At the conclusion of the January 27 bargaining session, Hammond understood that Commissioner Walter would schedule another meeting after the company negotiators reported available meeting dates to the mediator on January 31.

No further bargaining sessions were ever held. However, several pertinent written exchanges occurred between the parties and FMCS representatives over the next 4 months in a fruitless effort to schedule another meeting.

On February 6, Hammond sent a telegram to Edwards reporting that he had been informed the mediator planned to step aside and schedule no further meetings until the decertification matter was resolved. In light of this development, Hammond proposed that the Company and the union negotiators meet without the mediator on any workday between February 8 and 13.

Having received no response by February 13, Hammond wrote Edwards to propose negotiations on February 18, 19, 20, and 21. Hammond concluded by saying that it was ''imperative'' that he receive an ''immediate response.''

In fact Edwards had responded to Hammond's telegram by letter dated February 10 which Hammond did not receive until February 15. In that letter, Edwards advised that ''[i]nasmuch as the [Union has] previously requested the involvement of [FMCS] in our negotiations, and we have in fact met under the guidance of Commissioner Bert Walters [sic], we believe it appropriate that you schedule all such meetings through Commissioner Walters [sic].'' Edwards also asserted that the Company had never refused to meet, nor provide FMCS with available meeting dates.

Hammond then wrote to Walter on February 24 asking for his ''available dates'' to meet with the parties or for written advice that Walter could not assist in further negotiations ''for some reason.''[7]

Apparently in the week following Hammond's letter to the mediator, a bargaining session was arranged with company officials by Walter for March 23. Hammond learned of this scheduling in a telephone conversation with Walter on March 7 or 8. Dissatisfied with the pace of negotiations, Hammond wrote a lengthy letter to Walter on March 10 criticizing the mediator's efforts to schedule regular bargaining sessions and requesting that the mediator step aside if bargaining sessions could not be scheduled more frequently than ''one day every couple of months.'' Nonetheless, Hammond wrote Edwards on March 13 confirming the time and place of the March 23 meeting.

On March 17, Floyd Wood, the FMCS district director, sent separate letters to Hammond and Edwards canceling the March 23 bargaining session. In his letter to Hammond, Wood acknowledged receipt of the Hammond's March 10 letter to Walter and stated that the March 23 bargaining session arranged by Walter was canceled ''[s]ince this matter is now pending before the National Labor Relations Board.''

Four days later, Wood sent separate but substantively identical letters to Hammond and Edwards to ''clarify'' his March 17 letter. Wood explained that FMCS was withdrawing ''from negotiations between [the Company and the

[4] Edwards is an experienced labor relations professional. Prior to his 1986 employment with the Company, Edwards held responsible labor relations positions with a large aerospace manufacturer for 15 years.

[5] The RD petition was docketed as Case 31–RD–1140. Processing of that petition is blocked by these cases.

[6] Hammond claims Walter scheduled bargaining sessions with the Company for January 19 and 20 well in advance of those dates but advised him by telephone on January 18 that the Company would not be available to meet until January 27. Nevertheless, as Walter did not cancel the January 19 meeting, Hammond and the Local 192 committee met with Walter on that date. Edwards claims to have advised Walter that the company negotiators would not be available until January 27 when first contacted by the mediator.

[7] This letter followed a telephone conversation between Hammond and Walter on February 23. The content of that conversation was not elicited.

Union] since the question of representation rights of the union is currently pending before the National Labor Relations Board.'' Hammond received the Wood letters on March 21 and 22, respectively.

On March 21 Hammond wrote Edwards reporting that he had asked FMCS to step aside ''so we can schedule dates more frequently and of longer duration.'' Hammond proposed that the parties meet ''each week for as many days as necessary to conclude . . . negotiations'' and suggested that the parties commence this regimen by meeting March 27 through 31 at 4 p.m.

Thereafter, Edwards wrote to Walter on March 29 enclosing a copy of Hammond's March 21 letter and expressing reluctance to respond directly without consulting FMCS. Edwards ask for Walter's recommendation ''as to how we should proceed.'' Walter never replied to this letter.

On April 3, Hammond wrote to Edwards acknowledging receipt of the latter's March 29 letter to Walter. Hammond accused Edwards of ''trying to stall negotiations'' and demanded that the Company meet with the Union for negotiations. Hammond suggested that the parties meet in the period between April 10 through 14 and threatened ''appropriate action'' if the Company continued to refuse to meet with the Union.

Edwards responded to Hammond on April 11. Edwards' letter stated: ''While you may have asked [FMCS] to step aside, the Company believes that the most appropriate course of action is to coordinate bargaining under the auspices of [FMCS].'' Edwards did not address Hammond's request to meet in the period specified in Hammond's April 3 letter nor any other matter.

The charge in Case 31–CA–17659 alleging, among other matters, that the Company unlawfully refused to meet with the Union was filed on April 28. On June 1 Edwards wrote to Walter requesting that the mediator contact him about arranging a meeting with the Union and participating in negotiations. Walter never responded to the June 1 letter. As detailed more fully below, the Union was advised within the following 2 weeks that it would no longer be recognized by the Company as the exclusive employee representative.

Edwards claims that the ''tone'' of bargaining changed on January 27 when Hammond entered the negotiations. By Edwards perception the parties had made steady progress toward reaching an agreement before Hammond appeared. Hammond's presence, Edwards believes, caused the negotiations to revert ''back to square-one.'' Edwards claims that the Union attempted to put all new proposals on the table at the January 27 meeting despite the bargaining which had occurred over the past year but the mediator prevented this tactic by insisting that the parties stick to what had been done. For this reason, Edwards felt that it was ''most advantageous for all of us to have the FMCS involved in the bargaining.'' Edwards denied that he ever refused to meet with the Union without the presence of an FMCS mediator or that he ever refused to meet with the Union at all.

3. The request for bargaining information

On January 30, Hammond wrote to Edwards enclosing a two page form and asked that the Company supply the information called for in for forms ''as soon as possible.'' The forms requested a current employee seniority list reflecting employee classifications and wage rates. In addition the Union sought a breakdown of hourly costs for employee wages and benefits, the total man-hours worked and the average number of employees employed during the past year, and the total population of each employee grade or bracket utilized by the Company. Hammond explained that he routinely requested such information in bargaining in order to evaluate economic proposals and that he sought the information in this instance for that purpose.[8]

Twice thereafter—in his February 6 telegram and his February 13 letter—Hammond reminded Edwards of his prior information request. In his February 10 letter (which crossed in the mails with Hammond's February 13 letter), Edwards told Hammond that the information request forms had been forwarded to the Company's Dallas, Texas headquarters to compile the information and that it would be submitted to the Union ''[a]s soon as that data is available.''

On May 19 Edwards mailed the completed information forms to Hammond containing the employee cost breakdown and work category population. Although Hammond acknowledged—particularly on cross-examination—that he had been provided with the information called for in his January 30 request, Edwards' transmission letter of May 19 (G.C. Exh. 4) does not appear to include the requested seniority list, with employee classifications and individual wage rates specified. The record does not reflect when, if ever, that information was provided.

According to Edwards, the delay in furnishing the requested information resulted from difficulties at the Company's Dallas headquarters. At that particular time, Respondent's corporate office was altering its computerized record system. In the process, the software program essential to retrieving the some of the requested cost data was destroyed and a new program capable of retrieving that information had to be written. No explanation for the delay was ever provided to the Union.

4. Grievance bargaining

a. *The lunch period dispute*

Employees are normally provided an unpaid lunch break from 11 to 11:30 a.m. Under a policy maintained by the Company for sometime, employees whose work assignments prevent them from taking a lunch break within 5 hours after they start work are given a pay premium and a chance to eat a late lunch more compatible with their assignment. This practice is commonly called the ''interrupted lunch'' policy.

Once each year the Company sponsors a by-invitation-only luncheon to honor employees with a perfect attendance record. A luncheon cooked by the managers and supervisors is provided to the honored employees followed by an awards presentation. The affair is conducted on paid time.

In 1989, the perfect attendance luncheon was held in late April or early May. Invited employees were asked to attend the luncheon from noon to 2 p.m. Some invited employees apparently declined to attend.

On May 11 Hammond wrote to plant manager Jacobs advising that a ''labor dispute has arisen between [the Com-

[8] Hammond asserted that he initially submitted the forms to Edwards at the January 27 bargaining session and requested that the Company submit the information to him which Edwards promised to do. Edwards could not recall whether Hammond requested the information at the bargaining session or not.

pany and the Union] concerning the proper rate of pay for interrupted lunch.'' Hammond asked Jacobs to advise ''as to your earliest available dates to negotiate concerning this matter.'' The letter, Hammond explained, was occasioned by a complaint from an employee over the failure to receive ''interrupted lunch'' pay when the perfect attendance luncheon was held.

Jacobs responded on May 16 asking Hammond to provide ''specific details of your concern'' so he could ''investigate the situation.''[9] Hammond replied on May 25 saying ''[t]he Company is already aware of the facts involved in the interrupted lunch because you called in Lew Hill and Oly Olson, who are committee members, and asked them about it.'' Without further elucidation, Hammond repeated his request to meet and suggested May 30 or 31 as potential meeting dates.

On May 31, Jacobs answered Hammond's second ''interrupted lunch'' letter. Jacobs claimed that Hill and Olson had been unable to ''shed much light on the situation'' and advised Hammond that he would ''be happy to pursue the issue'' if Hammond would provide ''specific details of [his] concern.'' Otherwise, Jacobs said he would ''consider this matter closed.''

In a June 26 letter Hammond reminded Jacobs that he had written concerning the interrupted lunch dispute on ''several occasions'' but Jacobs had refused to provide the Union with available meeting dates. Hammond concluded by threatening to file a NLRB charge if the Company failed to respond to the demand for a meeting within 14 days. The Company did not respond.

b. *The Longyear warning*

In April the Company imposed a 10-day suspension on employee Robert Longyear based on an altercation between Longyear and another employee.

On October 12 Acting Plant Manager Montgomery issued a ''last and final warning'' to Longyear for purportedly writing the name of his April adversary on a company bathroom wall. The warning advised Longyear that he was to take a think-it-over day off with pay on October 13 and made it clear that he would be fired for any future breach of company policies and rules.

On October 17 Hammond wrote to Jacobs asking for a meeting to discuss ''a labor dispute concerning the disciplinary layoff of . . . Longyear.'' By letter dated October 23 Edwards declined to meet with the Union about Longyear ''or any other employee or issue'' because the Company had withdrawn recognition of the Union in June.

5. Union recognition

Clara Mosley, Respondent's Oro Grande personnel representative, testified that Carl Wray, the RD petitioner, presented her with an employee petition at her office one morning in early June. The multipage petition provides that the each signing employee does ''not want the [Union] to represent me as my Collective Bargaining Agent.''

Purportedly, the petition shocked Mosley. After she counted the names on the petition and made a Xerox copy, Mosley transmitted a copy of the petition to Respondent's counsel in Dallas by a facsimile machine. According to Mosley, 113 individuals she recognized as company employees had signed the petition. She returned the original to Wray who did not testify in this proceeding. Mosley asserted that there were 224 employees in the bargaining unit at the time.

By letter dated June 13, the Company's counsel advised the Union's counsel that the Company had received a petition signed by a majority of employees in the certified unit stating that they no longer wished to be represented by the Union. Accordingly, that letter advises, ''we are no longer willing to treat with your client'' as the employee representative.

B. *Conclusionary Findings*

1. Meeting without FMCS participation

Section 8(a)(5) of the Act mandates that employers must bargain collectively in good faith with the representative chosen by a majority of its employees. Section 8(d) of the Act defines the obligation to bargain collectively to include ''the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

Matters encompassed by the 8(d) phrase ''wages, hours, and other terms and conditions of employment'' are generally called mandatory subjects of bargaining. Other lawful subjects of bargaining not encompassed within that 8(d) phrase are traditionally called permissive or nonmandatory subjects of bargaining. As to mandatory subjects, a party may lawfully persist to the point of deadlock in negotiations; however, a party may not legally insist to impasse on a permissive subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

The General Counsel's argument is formulated from the *Borg-Warner* analytical framework. In the General Counsel's view, the presence or absence of the Federal mediator is a permissive subject and, hence, Respondent's insistence on the Federal mediator's presence was unlawful.

Respondent argues that the *Borg-Warner* approach is inappropriate because FMCS is established by the Act to assist the parties in resolving their disputes. Because FMCS already participated in these negotiations, Respondent argues, it could lawfully insist even under *Borg-Warner* that bargaining be conducted under the aegis of FMCS. Indeed, in footnote 6 at page 15 of its brief, Respondent seems to suggest that FMCS was not substantially justified in withdrawing from these negotiations and by doing so, ''the Company was placed in a precarious position.''

In my judgment participation by FMCS in these negotiations is of no legal significance. Instead, I believe that Respondent, by Edwards' letter of April 11 and its subsequent inaction, exhibited an unwillingness to ''meet at reasonable times'' as Section 8(d) commands.

In general, an employer's obligation under Section 8(d) of the Act to meet at reasonable times with the employee representative is wholly independent of the willingness of any mediator to participate.[10] By April 11, FMCS had unequivo-

[9] Jacobs' letters in response to Hammond's requests on this matter were drafted by Edwards.

[10] The letters to the parties from FMCS District Director Wood serve as the only explanation for FMCS's withdrawal. Those letters suggest a policy at FMCS to withdraw from contract negotiations if a decertification petition is filed with the NLRB. One can only speculate that such a practice, if it is that, is designed to maintain abso-

cally removed itself from the negotiations and Hammond, by his April 3 letter, had made an explicit request to meet on specific dates.

In these circumstances, I find Respondent had a statutory obligation to meet on dates suggested by Hammond or offer to meet at some other ''reasonable'' time. Edwards did neither; instead he still insisted that further meetings be arranged by FMCS, a very unlikely occurrence.

Respondent justifies this insistence on the ground that the ''tone'' of negotiations changed appreciably with Hammond's appearance on January 27 and that without the mediator's presence, little would be accomplished. This justification is not supported by any evidence apart from Respondent's vague, preconceived perceptions about Hammond's personalty.

District Director Wood's March 17 and 21 letters left Edwards with every reason to believe that FMCS would not ''coordinate'' further bargaining. Hence, Edwards' April 11 response to Hammond's April 3 demand to meet for negotiations is tantamount to no response at all. By following this course without correction thereafter, Respondent effectively refused to meet at any reasonable time after April 3 pursuant to Hammond's legitimate request, as alleged in the complaint. For these reasons, I find that Respondent violated Section 8(a)(5) of the Act.

2. The information request

The General Counsel argues in effect that the lost computer program excuse proffered by Edwards to explain the delay in furnishing the bargaining information lacks credibility essentially because the delay had never been provided previously to Hammond.

I am unwilling to discount Edwards' explanation merely because Hammond was not provided with an explanation for the delay. From the evidence before me it appears that the bargaining information request was lost in the shuffle after Hammond received Edwards' assurance in the latter's February 10 letter that the information would be provided when available. Following Hammond's February 13 letter—transmitted before he received Edwards' February 10 letter—the subject was never broached again by Hammond.

Where, as here, no effort was made to rebut the explanation provided by Edwards and the circumstances indicate that no explanation for the delay was ever previously requested or otherwise in order, I credit Edwards' explanation provided for the delay, find the delay justified for that reason, and recommend that this allegation be dismissed.

3. Withdrawal of union recognition

The General Counsel argues that the June 13 recognition withdrawal is unlawful in the face of Respondent's earlier unlawful refusal to meet with the Union. In the alternative, the General Counsel argues that Respondent has failed to prove with objective evidence that it had a good-faith doubt of the Union's majority status when recognition was withdrawn on June 13.

Respondent argues that Wray's June petition establishes that a majority of its employees no longer desired union representation and that it ''satisfies the Board's objective evidence standard'' for withdrawing union recognition. As for the General Counsel claim concerning prior unfair labor practices, Respondent argues that the legal theory relied on is not absolute and the General Counsel failed to meet the burden under that theory of establishing that its refusal to meet and bargain contributed to the Union's loss of majority status or tainted Wray's June petition.

The petition presented to Mosley by Wray in June which underpins Respondent's withdrawal of union recognition does appear to contain 113 signatures. A closer scrutiny indicates two significant periods of activity in connection with the petition. In the period between October 16 and November 25, 1988, at least 84 employees signed the Wray petition. It is reasonable to assume that this portion of the Wray petition served as the 30-percent showing of interest for his RD petition filed at the NLRB.

At least 27 individuals signed Wray's petition between April 22 and June 5, 1989. The greater bulk of these later signatures are dated between May 16 and 25, 1989. Two signature dates are so illegible on the copy introduced in evidence as to preclude even conjecture about which of the two general time periods they belong.

Mosley's testimony is the sole basis for Respondent's contention that the unit was comprised of 224 employees and that the Wray petition represented a majority of the unit employees at that time. No payroll records were proffered to support Mosley's testimony nor did Respondent offer any explanation for its failure to produce such records.

Although it cannot be said that proof of this nature is always fatal, Mosley failed to convince me either while testifying or on repeated readings of her testimony that anyone closely analyzed Wray's petition in conjunction with current personnel records to make the unequivocal determination that a majority of the current employees no longer desired union representation.

Reliance on Mosley's testimony is questionable for other reasons. The information provided to the Union on May 19 appears to reflect 229 unit employees at that time. This count is based on information shown on the second page of Hammond's form request. Even if it is assumed that Mosley's June unit census is accurate, it would be wholly improper to assume that the Wray petition was unaffected by the recent work force reduction. Over 88 percent of the signatures on Wray's June petition are dated before May 19 when the Company represented to the Union that there were 229 unit employees.

Where, as here, the validity of every single signature on the Wray petition is critical to establish Respondent's claim that the Union lacked majority standing, Respondent's failure to come forward with conclusive evidence—available to it alone—that every signature on the Wray petition was valid for majority determination purposes causes me to conclude that its affirmative defense has not been proven by reliable evidence.

Nor can I conclude, as Respondent claims, that no nexus was shown between its other unlawful conduct and the Wray petition in June. Between December 1988 and May 1989, Respondent's conduct totally stalled the already protracted negotiations for an initial contract. It is reasonable to con-

---

lute neutrality which might other wise be compromised if FMCS aided negotiating parties to conclude an agreement that might be adverse to the interests of the NLRB petitioner who, in all likelihood, would not be present at the bargaining table.

clude that such conduct would tend to undermine employee confidence in the new representative especially where the inability to even schedule meetings occurred after local representatives sought assistance from their parent organization. Following Respondent's other unlawful conduct, the Wray petition on its face received the added impetus of at least 27 signers. Hence, the character, timing and likely effect of Respondent's unlawful refusal to schedule regular bargaining sessions after January 27 appears to have significantly affected Wray's June petition.

For the foregoing reasons, I find that Respondent's June 13 withdrawal of union recognition was not based on objective evidence of doubt concerning the Union's continued majority status raised in a context free of unfair labor practices directed at causing employee disaffection with the Union. *Louisiana Dock Co.*, 297 NLRB 439 (1989). And see *Dresser Industries*, 264 NLRB 1088 (1982). By this conduct, Respondent violated Section 8(a)(5) of the Act as alleged.

4. Requests to bargain about grievances

Grievances concerning the terms and conditions of employment, including employee discipline, are mandatory subjects of bargaining even in the absence of a collective-bargaining agreement. *Storall Mfg. Co.*, 275 NLRB 220 (1985).

Respondent justifies its refusal to schedule a meeting as requested over the interrupted lunch matter on the ground that Hammond failed to provide a written summary about his concerns on this subject. And as the Longyear matter arose after Respondent withdrew union recognition, it argues that there was no obligation to meet.

Having concluded that Respondent unlawfully withdrew recognition, I find that Respondent's refusal to meet concerning the Longyear warning as requested violated Section 8(a)(5) of the Act.

The interrupted lunch matter substantively involved a tension between two apparently well-established policies, i.e., premium pay for an interrupted lunch and the annual perfect attendance banquet. In my judgment, Respondent's request that the Union clarify its concerns in writing before scheduling a meeting about the matter is not altogether unreasonable. However, as this issue arose during the period when Respondent was otherwise avoiding its obligation to bargain by refusing to meet with the Union, it is reasonable to conclude that Respondent's refusal to meet on this issue was part of a consistent unlawful strategy. Accordingly, I find that Respondent's refusal to meet as requested concerning the interrupted lunch violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive representative of employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All production and maintenance employees employed by the Employer at its Oro Grande, California facility; excluding all other employees, including office clerical employees, agricultural department employees, analysts, administrative clerks, shipping clerks, guards and supervisors as defined in the Act.

3. By refusing to recognize and to meet and bargain with the Union concerning grievances and the terms of a collective-bargaining agreement, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. Respondent did not unlawfully delay providing the Union with requested information as alleged in the complaint.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, the Order requires Respondent to recognize the Union, and meet and bargain, on request, in a timely manner without regard to participation by the FMCS concerning the terms of a collective-bargaining agreement as well as employee grievances.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Riverside Cement Company, a Gifford-Hill Cement Company, Oro Grande, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to meet and bargain with Independent Workers of North America, Local Union 192, concerning the terms of a collective-bargaining agreement and grievances of employees employed in the appropriate unit specified on page 12 of the administrative law judge's decision in Cases 31–CA–17659 and 31–CA–17924.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, meet and bargain with the Union as the exclusive representative of the employees in the appropriate unit specified in paragraph 1(a), above, concerning terms and conditions of employment, including employee grievances, without regard as to whether the Federal Mediation and Conciliation Service chooses to participate in such bargaining and, if understandings are reached, embody those understandings in signed agreements.

(b) Post at its Oro Grande, California facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice,

---

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent unlawfully delayed providing information requested by its employees' collective-bargaining representative.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize or to meet and bargain, on request, with Independent Workers of North America, Local Union 192, about the terms of a collective-bargaining agreement and grievances of employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its Oro Grande, California facility; excluding all other employees, including office clerical employees, agricultural department employees, analysts, administrative clerks, shipping clerks, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL meet and bargain with the Union without regard to the willingness of the Federal Mediation and Conciliation Service to assist in negotiations.

RIVERSIDE CEMENT COMPANY, A GIFFORD-HILL CEMENT COMPANY